Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,623-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

WILLIAM KYLE AYMOND, THAD HERRON, HILLARY DENISE HERRON and WILLIAM GARRETT AYMOND, ET AL.	Plaintiffs-Appellants

versus

CITIZENS PROGRESSIVE BANK	Defendant-Appellee

* * * * *

Appealed from the
Fifth Judicial District Court for the
Parish of Franklin, Louisiana
Trial Court No. 43,818-A

Honorable Anne L. Simon (*Ad Hoc*), Judge

* * * * *

SEDRIC E. BANKS S. HUTTON BANKS	Counsel for Appellants
MIXON, CARROLL & FRAZIER, PLLC By: James L. Carroll James E. Mixon Rossanna Rahim McIlwain	Counsel for Appellee, Citizens Progressive Bank
PETTIETTE, ARMAND, DUNKELMAN, WOODLEY, BYRD & CROMWELL, LLC. By: Joseph S. Woodley	Counsel for Third Party Appellee, Commercial Capital Bank

COTTON, BOLTON, HOYCHICK & DOUGHTY
By: David P. Doughty

Counsel for Appellee, Judge Terry A. Doughty

* * * * *

Before PITMAN, COX, and THOMPSON, JJ.

PITMAN, J.

Plaintiffs[1] KT Farms Partnership II, Thad Kyle Investments, LLC, William C. Aymond ("Billy"), Hillary Herron ("Hillary"), and Garrett Aymond ("Garrett"), appeal judgments sustaining an exception of *res judicata* and granting motions for summary judgment filed by Defendant Citizens Progressive Bank ("Citizens") and Third Party Defendant, Commercial Capital Bank ("Commercial") and dismissing them from the suit. Plaintiffs also appeal several interlocutory judgments. For the following reasons, the judgments are affirmed and Citizens's request for attorney fees under La. C.C.P. art. 2164 is denied.

FACTS

William Kyle Aymond ("Kyle") and Thad Herron ("Thad") organized a number of business entities to conduct a farming operation in Franklin and Tensas Parishes. The entities included KT Farms Partnership ("KT"); KT Farms Partnership II ("KT II"); KT Planting Partnership; Ruby-Jane, LLC; Pecan Brake, LLC; South Franklin Investments, LLC; and Thad Kyle Investments, LLC ("TKI"). Each year from 2008 through 2011, one or more of these entities obtained and repaid a crop loan from Citizens, which did not make any crop loans to Kyle and Thad personally.

In 2012, Citizens and other participating banks issued a crop loan to KT and KT II. After all proceeds from the 2012 crop had been applied to the loan, a balance of $2,975,909.50 remained due (the "Carry Over Loan"). At KT's request, Citizens agreed to refinance the balance due, but required

---

[1] Plaintiffs' attorney failed to specify exactly who was appealing the judgments of the trial court and, instead, has indicated that the appeal was filed by "KT Farms Partnership, et.al." The actual plaintiffs/appellants in the suit are those entities and persons mentioned in this paragraph.

collateral to secure the loan. The Carry Over Loan was made solely to KT as borrower, based on collateral pledged by KT Planting Partnership; Ruby-Jane, LLC; South Franklin Investments, LLC; TKI; KT; and KT II. Kyle and Thad also personally guaranteed the amount of the Carry Over Loan. KT and KT II made payments on the Carry Over Loan, and it was refinanced by Citizens in a new credit agreement for the remaining balance of $1,320,883.75 in March 2014. The new maturity date was March 17, 2015.

The Carry Over Loan was not paid when it matured in March 2015, and KT did not make arrangements to renew it. Citizens foreclosed on some of the collateral pledged by KT to secure the loan and filed two suits in the Fifth Judicial District Court – *Citizens Progressive Bank v. KT Farms Partnership, et al.*, Docket No. 44,227, (which foreclosed on land belonging to the defendants in that suit), and *Citizens Progressive Bank v. KT Farms Partnership, et al.*, Docket No. 44,604, (which foreclosed on equipment). None of the defendants in either suit appeared at the foreclosure proceedings to object or raise any defense to the actions. As a result, the Carry Over Loan was paid in full.

In 2013, after initially failing to secure a crop loan, KT reapplied to Citizens for a crop loan after the president of Commercial advised Gary Sanford, the president of Citizens, that Commercial would participate in a 2013 crop loan provided that the borrowing entity was not KT, which had an outstanding loan with Commercial and its lending limits prevented another loan to the same borrower. The lenders, Citizens, Commercial and Caldwell Bank and Trust Company ("Caldwell"), agreed to issue a 2013 crop loan (the "Crop Loan") to Garrett and Hillary (the children of Kyle and Thad) and Billy (Kyle's father). The $4.7 million line of credit established in the

names of Billy, Garrett, and Hillary was secured by the remaining collateral pledged as security for the Carry Over Loan. Neither Kyle, Thad, nor any of their related entities, applied to Citizens as borrowers for the Crop Loan. Later, Citizens also issued a $300,000 supplemental 2013 Crop Loan to Billy, Garrett and Hillary under the same conditions as those relating to the $4.7 million line of credit.

Citizens and Commercial drafted 13 written "Loan Requirements," which were included in the promissory note for the Crop Loan. A separate document containing the loan requirements was signed by Kyle, Thad, the Crop Loan borrowers (Billy, Garrett and Hillary), and Sanford (the banker). In March 2014, the $4.7 million Crop Loan and $300,000 supplement was paid in full and Citizens's lien was cancelled.

In October 2014, Plaintiffs (including others later dismissed from the suit), filed a petition for damages against Citizens, alleging breach of the Loan Requirements. They also alleged bad faith performance of written credit agreements, fraud and conversion of their farming business "lock, stock and barrel." They further alleged that their business had been fraudulently manipulated into liquidation. After filing exceptions of vagueness and no cause and no right of action, Citizens answered the original suit and filed a third party demand against Commercial.

The trial court granted Citizens's exception of vagueness, ordered Plaintiffs to amend their petition and deferred consideration of the other exceptions. Plaintiffs filed an amended petition adding Billy; KT Planting Partnership; Ruby-Jane, LLC; Pecan Brake, LLC; South Franklin Investments, LLC; and TKI; as party plaintiffs. Citizens again filed exceptions of vagueness, no cause and no right of action and failure to join

an indispensable party. The trial court denied its exceptions of vagueness, failure to join an indispensable party and no cause of action.

After a hearing on the exception of no right of action, the trial court issued written reasons for judgment and found that neither the Loan Requirements drafted by Citizens, nor the promissory note, contained any language to indicate that the Crop Loan was made for the benefit of any person other than the named makers. As a result, it determined that the Loan Requirements did not set forth a *stipulation pour autrui* in favor of Kyle and Thad, the nonmaker plaintiffs, because the contract language did not manifest a clear intent to benefit a third party. It further found that the Loan Requirements restricted the use of the loan proceeds and were not benefits. It rendered judgment granting Citizens's exception of no right of action and dismissed the claims of all plaintiffs except the named borrowers. This decision was appealed to this court.

In *Aymond v. Citizens Progressive Bank*, 50,825 (La. App. 2 Cir. 9/16/16), 206 So. 3d 330, this court affirmed the judgment in part and found that Kyle and Thad had failed to satisfy their burden of proving that they were third party beneficiaries of the Crop Loan. This court also rendered judgment reversing the trial court's action in part and determined that KT II and TKI both had a right of action. Therefore, this court found that the only viable plaintiffs in the action on the Crop Loan were Billy, Garrett, Hillary, KT II and TKI. In all other regards, the judgment was affirmed and the matter remanded for further proceedings.

A motion to recuse the trial judge was filed, and, while it was pending, in September 2017, the sitting judge signed a "Discovery and Trial Scheduling Order" and set the matter for trial for March 26, 2018. This

scheduling order included that "all amendments to pleading shall be filed on or before October 2, 2017."

The Louisiana Supreme Court appointed a judge *ad hoc* to hear the case. Litigation continued before the *ad hoc* judge and several interlocutory judgments were rendered which denied discovery requests, granted and denied sanctions, disallowed Plaintiffs' attempt to file a third amending and supplemental petition (which expanded the allegations) and denied motions for summary judgment. In an effort to streamline the litigation which had been ongoing for some time and in which there were many outstanding motions, the *ad hoc* judge issued an order that all parties would consolidate previously and timely filed dispositive motions into one motion, file a brief not to exceed 15 pages and attach appropriate exhibits.

Third Amending and Supplemental Petition and Res Judicata

On October 2, 2017, in accordance with the scheduling order, Plaintiffs attempted to file a 34-page "Third Amending and Supplemental Petition" without leave of court, sought to add four defendants and alleged for the first time that "Sanford and Adams acted, both individually and in concert in order to conceal plaintiffs' digitalized, unredacted, loan histories at Citizens covering calendar years 2011, 2012, 2013 and 2014." Plaintiffs claimed these allegations were prima facie evidence of fraudulent manipulation and malicious interference with fair and good faith performance of the credit agreements and Loan Requirements at issue.

The trial court struck the third amending and supplemental petition on December 15, 2017, and ruled that the pleading was to be treated as "not filed." In conjunction with this decision, it determined that issues raised therein dealt only with matters concerning the Carry Over Loan, which had

previously been settled as a result of the two foreclosure suits brought in the Fifth Judicial District Court. It decided that since no issues raised in the original petition or in the first amended and supplemental petition dealt with the Carry Over Loan, those claims were irrelevant to the case at bar. It sustained an exception of *res judicata* and precluded any discussion of the Carry Over Loan and any matter outside the scope of the credit agreement between the parties regarding the Crop Loan.

Discovery and Contempt Rulings

A motion hearing was held on February 27, 2018, at which time both Citizens and Plaintiffs appeared to be missing some discovery items from the opposite party. Therefore, although the deadline for discovery established by the previous trial judge had long since passed, the *ad hoc* judge allowed each party to request a few specific items within the next three days and the opposing party was to supply those items within five days thereafter. Depositions were limited to those new responses alone. The judge made it clear that full scale discovery was not being reopened and that the discovery being allowed was limited in nature.

On March 2, 2018, Plaintiffs responded by sending 78 requests for production, which were recognized by the trial court as being far beyond the letter and spirit of the newly permitted discovery. Citizens filed a motion to strike and/or motion for a protective order against Plaintiffs' supplemental discovery requests and a motion for partial protective order against Plaintiffs' notice of Citizens's deposition dated March 14, 2018. Plaintiffs filed a motion to hold Citizens in constructive contempt of court and requested sanctions and other relief.

Citizens submitted Exhibit E for an in-camera inspection and made a motion to have the court seal it as attorney work product. The trial court determined that the document was privileged work product and did not consider the contents in either preparation for the February 27, 2018 hearing or in any discovery decisions made. Citizens withdrew its motion to seal Exhibit E; however, the trial court did seal it for appellate review. This decision to look at evidence that was eventually sealed forms the basis of one of the assignments of error in this appeal.

On February 27, 2018, as memorialized in the judgment filed on March 12, 2018, the trial court addressed Plaintiffs' motion to hold Citizens in contempt and for sanctions. It stated that of the 1,700 pages of documents requested by Plaintiffs, most dealt with a loan not at issue in this matter, were previously disclosed or were not mentioned until Plaintiffs sought to depose someone. Citizens had objected to any discussion of claims related to the Carry Over Loan since it had been satisfied through the foreclosure proceedings brought in the Fifth Judicial District Court. Citizens made an objection in a brief in support of its motion for summary judgment and raised the issue as *res judicata*.

The trial court examined Plaintiffs' original petition and the first supplemental and amending petition and determined that claims related to loans concluded by foreclosure in Fifth Judicial District Court Docket No. 44,604 were not material to the instant inquiry. It took judicial notice of the existence of the foreclosure, which concluded the matter of the Carry Over Loan, and then granted the peremptory exception of *res judicata* made by Citizens. On the court's own motion, it recognized only causes of action alleged in Plaintiffs' original and first amended and supplemental petitions

relating to the Crop Loan. Because the trial court took judicial notice of Docket No. 44,604 of the Fifth Judicial District Court (the foreclosure of equipment), the record of that case has been included in this appellate record.

Motions for Summary Judgment

Commercial filed a motion for summary judgment against the third party demand of Citizens filed October 13, 2017; it filed a supplemental motion for summary judgment on February 15, 2018; and it filed a consolidated motion for summary judgment on March 16, 2018. Plaintiffs filed a motion to strike Commercial's motion for summary judgment on March 19, 2018.

Citizens filed a motion for summary judgment on October 13, 2017, and then filed a consolidated motion for summary judgment on March 21, 2018.

Plaintiffs filed a motion for summary judgment and a supplemental memo in support thereof on October 13, 2017. On March 21, 2018, they filed a consolidated brief "recross motions for summary judgment" and a motion to strike Defendant's application for summary judgment pursuant to La. C.C.P. art. 967(C).

On March 28, 2018, the trial court held a hearing and issued a judgment and reasons for judgment that were filed May 7, 2018. It noted that the causes of action at issue on March 28, 2018, pertained only to the Crop Loan.

Commercial's motions for summary judgment were addressed first, and the trial court noted that on February 27, 2018, it had granted partial summary judgment in favor of Commercial and against Plaintiffs, but that

that decision was in error since Plaintiffs did not bring a cause of action against Commercial. That judgment was vacated. Further consideration of Commercial's motions was pretermitted until the trial court ruled on Citizens's motions.

The trial court addressed Citizens's motions and stated that Plaintiffs had stated four causes of action against Citizens in their original and first amending and supplemental petition: (1) breach of contract of the written credit agreement, (2) fraud, (3) bad faith, and (4) wrongful conversion to take over Plaintiffs' farming operation. Citizens had filed a third party demand against Commercial as a participant in the loan agreement, seeking its *pro rata* share of any judgment that might be rendered against Citizens.

The trial court reviewed the evidence presented by Plaintiffs in support of their claims and considered Citizens's motions for summary judgment and decided that Citizens had pointed out to the court the absence of factual support for one or more elements essential to Plaintiffs' claims necessary to show breach, fraud, bad faith or wrongful conversion. In rendering its judgment, it specifically addressed Plaintiffs' arguments that Citizens had breached its contract by failing to fulfill the obligations in the Loan Requirements. It delineated each specific obligation and how Citizens was alleged to have breached the agreement. It found that Plaintiffs would be unable to prove their claims on the breach issue. Further, it addressed the allegations of bad faith, fraud and conversion and granted Citizens's motion for summary judgment.

After granting Citizens's motion, the trial court revisited Commercial's motions for summary judgment, granted the motions and dismissed Commercial with prejudice as a third party defendant.

The trial court denied all of Plaintiffs' motions and noted that the ones filed in February and March 2018 alleged new causes of action and were entirely new motions for summary judgment, in violation of the discovery and scheduling order issued by a prior judgment in the case in September 2017. It found that the allegations were not rooted in the four corners of the written credit agreement and inferred liability from the past relationship between the parties and other external evidence. It also found that Plaintiffs had failed to raise any genuine issues of material fact and denied their motions for summary judgment. It granted Citizen's motion to strike Plaintiffs' motion for summary judgment filed March 21, 2018.

Plaintiffs filed a petition to appeal the judgment of many of the trial court's interlocutory rulings and those related to *res judicata* and the motions for summary judgment through which their suit was dismissed. After the appeal was granted, motions were filed by Citizens to strike the record of Fifth Judicial District Court Docket No. 44,604, which was filed in the instant appellate record, and/or to add the record from Fifth Judicial District Court Docket No. 44,227, the other foreclosure case. The trial court allowed the record to be supplemented with Docket No. 44,604, but not Docket No. 44,227. A motion was filed with this court, and an order was rendered on March 8, 2019, denying Citizens's motion to strike Docket No. 44,604 from the record and denying its alternate motion to supplement the appellate record with Docket No. 44,227.

Plaintiffs appeal the foregoing interlocutory and final judgments of the trial court.

DISCUSSION

Most of the interlocutory rulings raised as error by Plaintiffs have previously been considered by this court under its supervisory jurisdiction and writs were denied. For the sake of judicial economy, we will address the ones that have a bearing on other decisions first.

Motion to Strike the Third Supplemental and Amending Petition

Plaintiffs argue that the trial court erred in granting Citizens's and Commercial's motion to strike Plaintiffs' third amending and supplemental petition, which they attempted to file on October 2, 2017, without first requesting leave of court. They contend that this was error since they could not have timely requested leave to amend on the day the scheduling order was signed on September 19, 2017, and the scheduling order required them to file any amendment by October 2, 2017. Plaintiffs asssert that the requirements of "reasonable notice" under La. C.C.P. art. 1151 and delays imposed by District Court Rule 9.9 prohibited compliance with the scheduling order because those time delays would have required them to file the petition four days before the scheduling order was even signed.

Plaintiffs further argue that Citizens and Commercial were to blame for belatedly producing documents and that an extension of time for them to review those documents and conduct depositions should have been granted. They assert that the trial court's reliance on the former judge's deadline for amending pleadings was an abuse of discretion.

Succinctly stated, Citizens argues that an amended petition filed without leave of court, when such permission is required, may not be considered.

Commercial also filed a brief in opposition to this particular assignment of error arguing that La. C.C.P. art. 1151 provides only two scenarios in which a plaintiff may amend his petition without leave of court – before the answer is served and when the court orders a plaintiff to amend after an exception is granted. Otherwise, permission from the court or consent of the parties is required. Commercial contends that Plaintiffs' attempt to file a third amended petition was intended as a dilatory tactic and would have resulted in the upsetting of the trial date and undue delay to Commercial's prejudice. Commercial asserts that the trial court correctly struck the Plaintiffs' third amending and supplemental petition.

La. C.C.P. art. 1151 states in pertinent part as follows:

> A plaintiff may amend his petition without leave of court at any time before the answer thereto is served. He may be ordered to amend his petition under Articles 932 through 934. A defendant may amend his answer once without leave of court at any time within ten days after it has been served. Otherwise, the petition and answer may be amended only by leave of court or by written consent of the adverse party.

La. C.C.P. art. 1155 states as follows:

> The court, on motion of a party, upon reasonable notice and upon such terms as are just, may permit mover to file a supplemental petition or answer setting forth items of damage, causes of action or defenses which have become exigible since the date of filing the original petition or answer, and which are related to or connected with the causes of action or defenses asserted therein.

After an answer to the petition has been served, the plaintiff may amend the petition only by leave of court or by written consent of the adverse party. La. C.C.P. art. 1151; *Bilyeu v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 50,049 (La. App. 2 Cir. 9/30/15), 184 So. 3d 69, *writ denied*, 15-2277 (La. 2/19/16), 187 So. 3d 462. The law takes a liberal approach to allowing amended pleadings to promote the interests of justice.

Id., citing Reeder v. North, 97-0239 (La. 10/21/97), 701 So. 2d 1291, and *Walton v. Burns*, 47,388 (La. App. 2 Cir. 1/16/13), 151 So. 3d 616.

Amendment is generally allowed, provided the mover is acting in good faith, the amendment is not sought as a delaying tactic, the opponent will not be unduly prejudiced and trial of the issues will not be unduly delayed. *Giron v. Hous. Auth. of City of Opelousas*, 393 So. 2d 1267 (La. 1981); *Hibernia Nat'l Bank v. Antonini*, 33,436 (La. App. 2 Cir. 8/23/00), 767 So. 2d 143. The decision to allow or disallow amendment is within the trial court's broad discretion. *Giron v. Housing Auth., supra*; *Short v. Short*, 40,136 (La. App. 2 Cir. 9/23/05), 912 So. 2d 82, *writ denied*, 05-2320 (La. 3/10/06), 925 So. 2d 519.

A trial court has broad discretion in ruling on motions to amend pleadings, and a decision to accept or reject an amendment should not be disturbed on appeal absent abuse of that discretion. *Gibson v. Resin Syst., Inc.*, 15-299 (La. App. 3 Cir. 10/7/15), 175 So. 3d 1141; *Wadick v. Gen. Heating & Air Conditioning, LLC*, 14-0187 (La. App. 4 Cir. 7/23/14), 145 So. 3d 586, *writ denied*, 14-1913 (La. 11/21/14), 160 So. 3d 972.

It has been frequently held that an amended petition filed without leave of court, when such permission is required, may not be considered and is totally without effect. *Gaspard v. Safeway Ins. Co.*, 15-1197 (La. App. 1 Cir. 8/31/16), 202 So. 3d 1128; *Carolina Cas. Ins. Co. v. John Day House Movers, Inc.*, 525 So. 2d 116 (La. App. 3 Cir. 1988).

There is a distinction made between amended pleadings and supplemental pleadings. A supplemental pleading differs from an amended pleading in that an amended pleading involves matters which occurred before the original complaint was filed and which were either overlooked

by the pleader or were unknown to him at the time, while a supplemental pleading covers issues or causes of action which have arisen since the filing of the original petition, which relate to the issues or actions contained in the original petition. *Gaines v. Bruscato*, 30,340 (La. App. 2 Cir. 4/8/98), 712 So. 2d 552, *writ denied*, 98-1272 (La. 6/26/98), 719 So. 2d 1059.

Plaintiffs filed the third amending and supplemental petition without leave of court and without consent of the parties in violation of the procedure set out in La. C.C.P. art. 1155. This litigation had been ongoing for several years before Plaintiffs attempted the filing; and, therefore, leave of court or consent of the parties was necessary before the petition could be filed. The petition was extremely expansive and its filing could be considered a dilatory tactic. We find no abuse of discretion in the trial court's decision to consider the petition as not filed, and the decision will not be disturbed on appeal.

Therefore, this assignment of error is without merit.

Res judicata

The judgment of the trial court states in pertinent part as follows:

> Following Hearing on the Discovery Motions, and in order to advance to the Dispositive Motion stage of this matter, the Court issues additional Rulings and a Scheduling Order as follows:
>
> IT IS ORDERED, ADJUDGED AND DECREED THAT:
>
> A. The Court takes judicial notice of the existence of foreclosure filed in the 5th Judicial District Court under Docket No. 44,604 which concluded the matter of Loan #7112220, executed March 11, 2013, known in these proceedings as the "Carry Over Loan". The Court grants the Peremptory Exception of Res Judicata made orally by CITIZENS, and on the Court's own motion, recognizes as material to this proceeding only causes of action in Plaintiffs' Petition and First Amended and Supplemental Petition with respect to the 4.7 mil Crop Loan, #7112436.

Plaintiffs argue that the suit upon which Citizens based its objection of *res judicata* was a suit in which Citizens foreclosed on Plaintiffs' farm equipment via executory process, i.e., Docket No. 44,604. They claim that Citizens was appointed "Keeper" of their equipment, that it seized all equipment and that it later requested the writ of *fi fa* be returned unexecuted, which was done. Then, on motion of Citizens, the trial court in that case ordered the foreclosure suit dismissed without prejudice.

Plaintiffs also argue that Citizens's exception of *res judicata* in the instant ordinary proceeding was not specifically pled, but was mentioned in its summary judgment memorandum and then was noticed *sua sponte* by the trial court and granted. Plaintiffs assert that the trial court erred in taking judicial notice of a suit which contained no final judgment. They contend that the parties are not the same in the earlier suit, and *res judicata* fails under La. R.S. 13:4231 since there was no judgment.

Citizens points out that when the Carry Over Loan was not paid at maturity on March 17, 2015, and KT did not make arrangements to renew the loan, it foreclosed on some of the collateral pledged by KT to secure that loan through the two foreclosure proceedings in the Fifth Judicial District Court. It claims that it and TKI reached a settlement by which Thad's father-in-law, Dennis Crain, created a company and bought the equipment subject to foreclosure, and the suit was dismissed. Citizens argues that it was proper for the trial court to limit the suit to only those issues related to the Crop Loan and to disallow any claims related to the Carry Over Loan, since no issues were raised concerning the Carry Over

Loan until Plaintiffs attempted to file a third amended and supplemental petition.

La. C.C.P. art. 865 states that every pleading shall be so construed as to do substantial justice. It is well settled in Louisiana that courts look beyond the caption, style and form of pleadings to determine from the substance of the pleadings the nature of the proceeding. *In re Succession of Harrison*, 48,432 (La. App. 2 Cir. 11/8/13), 129 So. 3d 681, *writ denied*, 14-0273 (La. 4/4/14), 135 So. 3d 1185, *citing Smith v. Cajun Insulation, Inc.*, 392 So. 2d 398 (La. 1980); and *Murrell v. Murrell*, 42,070 (La. App. 2 Cir. 4/25/07), 956 So. 2d 697. A court inherently possesses all of the power necessary for the exercise of its jurisdiction though not granted expressly by law. La. C.C.P. art. 191.

While, technically, Plaintiffs' arguments concerning *res judicata* are arguably correct, we note that wording used by the trial court to take judicial notice of the earlier filed foreclosure proceeding was an insignificant error. Although the trial court stated it sustained the peremptory exception of *res judicata*, the substance of the ruling was that it intended to limit the scope of the issues at trial to only those previously raised in the original petition and in the first amending and supplemental petition. Therefore, we construe the ruling in which the words *res judicata* were used as something other than what the technical term implies and find it was within the trial court's discretion to rule that the issues raised concerning the prior foreclosures and the Carry Over Loan were excluded from consideration in the case at bar.

Therefore, Plaintiffs' arguments with regard to *res judicata* are without merit.

Discovery, Sanctions and Procedural Issues

Plaintiffs raised at least eight assignments of error related to various discovery issues, sanctions, motions to quash subpoenas and depositions, protective orders, the viewing by the trial court of sealed documents and the fact that the trial court held a telephone hearing, which was not recorded. Many of these issues were considered by this court under its supervisory jurisdiction and have now been reconsidered under the court's appellate jurisdiction. A restatement of the facts, procedure and exact rulings of the trial court is unnecessary to the resolution of these matters on appeal. Following is the law applicable to the issues raised.

Discovery, Protective Orders, Sanctions, Telephone Conference and Sealing of Exhibit E

General provisions of the law governing discovery are found in La. C.C.P. arts. 1420, et seq. Scope of discovery is governed by La. C.C.P. art. 1422 and states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is well established that trial courts in Louisiana have broad discretion when regulating pre-trial discovery. *Stolzle v. Safety & Sys. Assur. Consultants, Inc*., 02-1197 (La. 5/24/02), 819 So. 2d 287. An appellate court should not upset such a ruling absent an abuse of discretion. *Maguire Plastic Surgery Ctr., LLC v. Booker*, 47,929 (La. App. 2 Cir. 5/22/13), 117 So. 3d 239, *citing Walker, Tooke & Lyons, L.L.P. v. Sapp*, 37,966 (La. App. 2 Cir. 12/10/03), 862 So. 2d 414, *writ not considered*,

04-0088 (La. 3/19/04), 869 So. 2d 836. This broad discretion includes the right to refuse or limit discovery of matters that are not relevant to the issues. *Maguire*, *supra*.

La. C.C.P. art. 1426 concerns protective orders and states that for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Article 1426 authorizes the district court to issue a protective order, for good cause, to limit the scope of discovery or to preserve the confidentiality of the information disclosed. *Fox v. Fox*, 49,619 (La. App. 2 Cir. 4/22/15), 164 So. 3d 359, *writ not considered*, 15-1162 (La. 9/18/15), 177 So. 3d 1063. The determination of whether or not to issue a protective order, and the extent of protection extended, are issues within the sound discretion of the trial court. Ordinarily, an appellate court will not modify or reverse the district court in such matters absent a showing of an abuse of discretion. *Id*.

La. C.C.P. art. 863 concerns the imposition of sanctions and provides that if the court determines that a certification has been made in violation of the provisions of the article, the court shall impose an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. Once the trial court determines that sanctions are appropriate, it has considerable discretion as to the type and severity of the sanctions imposed. *Alpine Meadows, L.C. v. Winkler*, 49,490 (La. App. 2 Cir. 12/10/14), 154 So. 3d 747, *writ denied*, 15-0292

(La. 4/24/15), 169 So. 3d 357. We review the type and amount of the sanction under the abuse of discretion standard. *Id.*

In regard to the telephone hearing held by the trial court, note that La. C.C.P. art. 191 states that a court inherently possesses all of the power necessary for the exercise of its jurisdiction though not granted expressly by law. Further, in *Fox, supra*, this court held that the appellant's contention that its due process rights were denied because the telephone status conference was not recorded lacked merit where the appellant had motioned for the status conference and did not request that it be recorded. In the case at bar, we find that it was well within the inherent powers of the trial court to hold a hearing over the telephone when the parties had notice that it was the intention of the trial court to hear the matter that way since travel to Winnsboro was an impossibility for the judge at that time.

Exhibit E contained documents produced by Citizens, which it asked the court to seal as attorney work product. Citizens claimed that the documents had been produced at other times. Plaintiffs argue it was error for the trial court to consider the documents and then to reseal the exhibit. Unless otherwise ordered by the court, a party need not produce the same information, including electronically stored information, in more than one form. La. C.C.P. art. 1462(D). Trial courts have broad discretion when regulating pretrial discovery. *See Stolzle*, *supra*.

The trial court did not abuse its discretion with regard to any issue relating to discovery, the issuance or nonissuance of protective orders or sanctions imposed. The trial court did not abuse its discretion by holding a telephone hearing or by sealing Exhibit E.

Therefore, these assignments of error are without merit.

The trial court erred in amending its order after granting Plaintiffs an appeal

Plaintiffs complain that they timely filed and served their petition for appeal with designation of the record on June 6, 2018. The appeal was granted on June 11, 2018, and notice was mailed on June 15, 2018. On June 13, 2018, Citizens objected to the designation of the record and the trial court issued an amended order for appeal on June 25, 2018. Plaintiffs argue that Citizens's objection was untimely and the trial court was divested of jurisdiction by signing the order for appeal after Citizens's deadline for objecting to the designation of the appeal record.

Citizens claims this assignment of error is frivolous and that its motion to designate the record was timely, and it was within the trial court's discretion to amend the order to resolve a clerical, incidental matter.

La. C.C.P. art. 2128 concerns the record on appeal and the determination of its content. Objections to the content of the record can be made in accordance with this article, which states that within three days, exclusive of holidays, after taking the appeal, the appellant may designate in a writing filed with the trial court such portions of the record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in a writing filed with the trial court such other portions of the record as he considers necessary.

Even after the record is transmitted to the appellate court, any record which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected by the

parties by stipulation, by the trial court or by the order of the appellate court. La. C.C.P. art. 2132.

We find that Citizens's motion to designate the record and amend the record on appeal was timely filed.

This assignment of error is, therefore, without merit.

Motions for Summary Judgment

Commercial was erroneously permitted a second new summary judgment motion

Trial court denied Plaintiffs' motion to strike Commercial's motion for partial summary judgment

Plaintiffs argue that because Commercial was dismissed from the lawsuit, it lacked standing to file a new motion for summary judgment with documents not previously attached to its previous motion. They also argue that the time limitations for the filing and serving motions for summary judgment are mandatory and that Commercial filed a new motion for summary judgment approximately four months after the deadline and a new motion for summary judgment 11 days prior to summary judgment hearings. For these reasons, they claim the trial court erred when it denied their motion to strike Commercial's motion for partial summary judgment.

Commercial argues that Plaintiffs have raised issues concerning a motion for summary judgment filed by it in response to Citizens's third party demand. Not even Citizens has raised any objections to the Commercial filings. Commercial's motion for summary judgment has nothing to do with the Plaintiffs' demand, and they have no claim against Commercial. Further, Commercial argues that it filed the second motion because the trial court instructed it to when the new judge was streamlining the case.

Commercial also responds by pointing out that its motion for partial summary judgment was addressed to Citizens's third party demand and not to Plaintiffs' case. It asserts that Plaintiffs have no standing to raise any issues concerning the motion filed by it since not even Citizens raised any objections about it.

Plaintiffs have no interest in the motion for summary judgment filed by Commercial in response to Citizens's third party demand.

Accordingly, these assignments of error are without merit.

Trial court erred in denying Plaintiffs' motion for relief under La. C.C.P. art. 967, in denying their motion for summary judgment and in granting the summary judgment filed by Citizens

Plaintiffs argue that they were denied the right to fully develop their case for their summary judgment by the trial court's denial of the discovery issues they raised, i.e., refusing to extend the discovery cutoff date, refusing to grant motions to compel and not allowing them to depose certain people after Citizens provided them with over 1,700 pages of discovery materials. Earlier in this opinion we found no abuse of discretion in the ruling of the trial court with regard to this matter and found the assignment of error had no merit. We now address the merits of the motion for summary judgment granted by the trial court.

Plaintiffs argue that Citizens breached the written credit agreements by misrepresenting the true balance owed on the Carry Over Loan, and its note for the loan is ambiguous. They claim that Citizens breached the contract as to the Crop Loan and there was ambiguity in the "early payment" clause which required payment prior to the due date to exist in both the Carry Over Loan and the Crop Loan. They rely on the Loan Requirements, which were addressed much earlier in the litigation, and complain that, as a

result of Citizens breaching these requirements, it controlled their 2013 profit and used it as if the money was its own. They further argue that although at the end of 2013, when they owed nothing to Citizens on the Crop Loan and the remaining balance of almost $300,000 was owed to Commercial, Citizens unilaterally "agreed to accept $700,000" for Plaintiffs' rice, which they had contracted to sell for $800,000. Plaintiffs contend that Citizens "agreed to accept money for rice when nothing was owed to it, and Plaintiffs were denied profits to make arrangements with outside creditors." For these reasons, Plaintiffs assert that the trial court erred in denying their motion for summary judgment and in granting Citizens's motion.

Citizens argues that any issue raised by Plaintiffs concerning the Carry Over Loan has been nullified by the trial court's decision to disallow the third amending and supplemental petition and that none of the arguments relating to those documents are at issue in this case.

Citizens further argues that the trial court addressed the causes of action alleged in the original petition and in the first amending and supplemental petition and found that those claims relate only to the Crop Loan. The trial court noted that Plaintiffs' suit alleged breach, fraud, bad faith and conversion, considered Citizens's motion for summary judgment and attached documentation, and granted its motion for summary judgment. The trial court further considered all of the evidence presented by the parties and found that Citizens had pointed out to the court the absence of factual support for one or more elements essential to Plaintiffs' claim. At that point, the burden shifted to Plaintiffs to produce factual support sufficient to establish the existence of a genuine issue of material fact or that Citizens was not entitled to judgment as a matter of law.

A motion for summary judgment shall be granted if the motion, memorandum and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966.

La. C.C.P. art. 966(D)(1) states:

> The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

Summary judgments are reviewed *de novo* using the same criteria that govern the district court's consideration of whether a summary judgment should be granted. *Franklin v. Dick*, 51,479 (La. App. 2 Cir. 6/21/17), 224 So. 3d 1130, *citing Richard v. Hall*, 03-1488 (La. 4/23/04), 874 So. 2d 131, and *Capital One Bank (USA) NA v. Thompson*, 47,994 (La. App. 2 Cir. 5/15/13), 115 So. 3d 704. A genuine issue is one about which reasonable persons could disagree. *Franklin, supra*. A material fact is one that potentially ensures or precludes recovery, affects the ultimate success of the litigant, or determines the outcome of the dispute. *Id.* Whether a fact is "material" for purposes of summary judgment is determined in light of the substantive law applicable to the particular case. *Id., citing Richard, supra*.

Plaintiffs' causes of action of fraud, intentional breach of contract, bad faith and conversion are based on the contract of loan for the $4.7 million Crop Loan and the Loan Requirements to which they agreed as a condition of receiving the Crop Loan.

Fraud

In their first amending and supplemental petition, Plaintiffs alleged that Citizens had begun a fraudulent scheme to wrongfully convert or gain unjust advantages over them or to force the liquidation of the farming operation. Citizens allegedly accomplished this by offering a written "credit agreement" to unqualified borrowers, i.e., Hillary, Garrett and/or Billy, two of whom were 19 and 20 years old, respectively, and who had no job, credit history, income, bank account, assets or farming experience. Plaintiffs alleged that Citizens's scheme included concealing the fact that it intended to use the Crop Loan against these unqualified borrowers as "bait" to gain more than $2 million in additional collateral.

Fraud is defined in La. C.C. art. 1953 as a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.

The elements of a fraud claim are (1) a misrepresentation, suppression or omission of true information; (2) the intent to obtain some unjust advantage or to cause some damage or inconvenience to another; and (3) the error induced by the fraudulent act must relate to a circumstance substantially influencing the victim's consent. *McCarthy v. Evolution Petroleum Corp.*, 47,907 (La. App. 2 Cir. 2/27/13), 111 So. 3d 446, *writ denied*, 13-1022 (La. 6/28/13), 118 So. 3d 1097, *citing Shelton v. Standard/700 Assocs.*, 01-0587 (La. 10/16/01), 798 So. 2d 60.

All persons have capacity to contract, except unemancipated minors, interdicts and persons deprived of reason at the time of contracting. La. C.C. art. 1918. Consent may be vitiated by error, fraud or duress. La. C.C. art. 1948.

Plaintiffs failed to offer any evidence that they were fraudulently induced to sign the Crop Loan. Their depositions indicate that they all knew the loan was for farming operations and that they were all listed as members or partners of various entities involved in the family farming business. Hillary and Garrett both stated that they signed the loan because their fathers asked them to do so. Their first amending and supplemental petition states that Citizens only agreed to provide the loan to Kyle and Thad if their children were designated on the loan as borrowers and if they would sign the written credit agreements, and Plaintiffs agreed to all conditions placed on their receipt of the loan. They signed the loan and pledged the collateral willingly. Citizens paid the submitted requests until the funds were exhausted. Therefore, Plaintiffs have not introduced any evidence which would raise a genuine issue of material fact with regard to their claim that Citizens acted fraudulently in the inducement of this contract.

Therefore, this assignment of error is without merit.

Breach of Contract

An obligor is liable for the damages caused by his failure to perform a conventional obligation. La. C.C. art. 1994. A failure to perform results from nonperformance, defective performance or delay in performance. *Id.* La. C.C. art. 1994. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived. La. C.C. art. 1995. *Volentine v. Raeford Farms of Louisiana, LLC*, 50,698 (La. App. 2 Cir. 8/15/16), 201 So. 3d 325, *writ denied*, 16-1924 (La. 12/16/16), 212 So. 3d 1171, and *writ denied*, 16-1925 (La. 12/16/16), 212 So. 3d 1171.

Plaintiffs asserted a cause of action against Citizens for intentionally breaching the written credit agreement for the Crop Loan. Although that

loan had been paid in full, Plaintiffs claim that Citizens failed to fulfill certain of the Loan Requirements, specifically, Nos. 1, 4, 6, 7 and 8, and that such failure resulted in damages to them.

Sanford (president of Citizens) testified that Citizens and Commercial prepared the Loan Requirements with the intent to limit the use of the loan funds to pay the expenses for equipment, rent and supplies related to the Crop Loan.

Loan Requirement No. 1 stated:

> CROP CONSULTANT WILL SUBMIT A MONTHLY CROP CONDITION REPORT.

There is no other language expressed in that first requirement which would indicate who would be responsible for hiring or paying the crop consultant. It simply indicates that Plaintiffs were required to have a crop consultant submit a monthly crop condition report to the lender. It did not create any obligation for Citizens to do anything with regard to this loan requirement. Therefore, if Citizens had no obligation, or duty, under this loan requirement, it cannot be said to have breached it. No genuine issue of material fact remains with regard to this loan requirement.

Loan Requirement No. 4 stated:

> NO FUNDS WILL BE RELEASED UNTIL ALL LOANS FOR THE CROP PRODUCTION ARE PAID IN FULL WITH THE EXCEPTION OF CASH RENT DUE IN THE FALL OF 2013 IF NECESSARY. AT THE TIME ALL CROP LOANS ARE PAID IN FULL, THE LENDER WILL CONTACT HELENA CHEMICAL COMPANY TO ARRANGE PAYMENT OF $250,000.00 PLUS INTEREST DUE ON FALL PAYMENT FOR FERTILIZER APPLIED TO THE 2013 WHEAT CROP.

Plaintiffs argue that Citizens breached its obligation since it did not release any of the funds once the Crop Loan was paid in full. In their

amended petition, they alleged that Citizens failed and refused to timely advance or release funds to pay the cash rent, which caused them to incur a penalty of $47,000 and damaged their credit. They also alleged that Citizens wrongfully delayed performing its obligation to fund land rent, which caused landowners to cancel, if not withdraw, future farming leases. They further argue that Citizens failed to honor a check they wrote for almost $1 million on March 1, 2013, to pay for their spring crop.

Citizens claims it had no obligation to honor that draw of almost $1 million since it was for spring rent and it occurred prior to the effective date of the Crop Loan.

The affidavit of Griffin Moag, representative of the landlord, Angelina (a/k/a Ponchartrain Investment), to which the rent payment was due, stated that he negotiated the terms and conditions of the 2013 lease with Thad or Kyle and at no time did he discuss or negotiate the KT lease with any person representing Citizens. He stated that Plaintiffs had submitted a first payment on the spring lease that was due on March 1, 2013, but the check KT sent was returned to Angelina for nonsufficient funds. KT paid the spring rent in full plus accrued interest, but did not pay the penalty. KT signed an addendum that made the penalty due on June 30, 2013, and it was actually paid on July 5, 2013. The affidavit further stated that fall rent was due on or before November 15, 2013, and was paid in full via multiple payments, credits and offsets with final payment made on November 8, 2013. KT did incur a $47,000 late payment penalty; however, the fall rent was paid early and KT received a 50 percent credit on the paid late fee, which was applied to the fall rent. Moag's affidavit also stated that Plaintiffs and Angelina failed to reach an agreement on the 2014 lease and

that at no time did he discuss or negotiate with Citizens regarding the terms or conditions of KT's 2014 lease.

Citizens introduced documents, unrefuted by Plaintiffs, demonstrating that it actually paid the fall rent before the due date, thereby reducing the penalty owed. As a result of the unrefuted evidence, Plaintiffs were unable to raise a genuine issue of material fact as to this part of the Loan Requirement.

Plaintiffs argue that Citizens allegedly refused to contact Helena Chemical and arrange payment of the $250,000 plus interest. However, the evidence submitted with Citizens's motion for summary judgment included Helena Chemical's business records that demonstrated the KT entities began the year 2013 with a $0 balance. In February 2013, KT created an obligation to pay $253,341 for fertilizer for the wheat crop. On March 29, 2013, prior to when the Crop Loan would become due, Citizens released funds to pay $302,452 to Helena Chemical, thereby complying with its obligation under Loan Requirement No. 4 sooner than required and in a greater amount.

For these reasons, Plaintiffs have failed to show that any genuine issue of material fact remains in regard to allegations concerning a breach of Loan Requirement No. 4.

Loan Requirement No. 6 states:

> THE BANK WILL APPROVE BY INVOICE, THE AMOUNT OF CHECKS WRITTEN TO PAY SUPPLIERS. LETTERS OF TRUST WILL BE SENT TO SUPPLIERS REGARDING CREDIT BALANCES AND PROCESS OF REIMBURSEMENT TO BANK. REPRESENTATIVES FROM CITIZENS PROGRESSIVE BANK AND COMMERCIAL CAPITAL BANK WILL MEET AS NEEDED TO APPROVE ALL PAYMENTS TO SUPPLIERS AND APPROVE ANY NOTES TO BE PAID TO OUTSIDER

> DEBTORS. INVOICES OR PAYMENT SLIPS WILL BE REQUIRED.

The promissory note signed by Plaintiffs states that "This Note contemplates loan advances. Once the total amount of the principal has been advanced under this Note, Borrower will not be entitled to further loan advances." The note indicates that the loan was not a revolving line of credit, but was a traditional commitment line of credit by which borrowers made draws to pay creditors for the farming operations as needed until they reached the total of $4.7 million. The $300,000 supplemental loan on the Crop Loan was made to Hillary, Garrett and Billy under the same conditions as the $4.7 million loan, and draws were made on the loan until the funds were exhausted.

Servicing the loan

Although Plaintiffs complain about the process by which their loan was serviced, with draws being made against the loan once Citizens determined that the request for the money was being made only for expenses related to the Crop Loan, this was the procedure to which Plaintiffs agreed when they signed the promissory note evidencing the debt. The depositions of Plaintiffs demonstrate that the funds were routinely approved until the loan funds were exhausted. The trial court found that Plaintiffs had failed to produce any evidentiary support for improper processes employed by Citizens or Commercial. We agree.

For these reasons, Plaintiffs have failed to raise any genuine issues of material fact with regard to this portion of Loan Requirement No. 6.

Letters of Trust

Plaintiffs argue that letters of trust acknowledged to benefit the borrowers were never sent to suppliers, and timely applications of crop inputs were denied.

As we stated in *Aymond*, *supra*, this requirement does not involve a benefit to third parties from the Crop Loan. Loan Requirement No. 6 "refers to a situation in which the supplier would reimburse the lender for a credit due on any returned supplies that were purchased with loan funds." The language does not show any benefit to Plaintiffs. Therefore, Citizens is not obligated to Plaintiffs under this provision, and a breach by it is an impossibility.

For these reasons, Plaintiffs have failed to raise a genuine issue of material fact with regard to Loan Requirement No. 6.

Loan Requirement No. 7 states:

> BORROWERS WILL MAKE ARRANGEMENTS WITH OUTSIDE CREDITORS CONCERNING THE DEBT ASSOCIATED WITH 2012 CROP. THESE DEBTS WILL NOT BE PAID WITH 2013 CROP LOAN PROCEEEDS.

The purpose of this loan requirement is clear on its face. Citizens clarified that the Crop Loan would not be used in any way to pay debts associated with the 2012 crop. It does not create any obligation on the part of Citizens and only places the onus on Plaintiffs to arrange payment to its creditors for any cost associated with the 2012 crop. Therefore, Citizens does not owe any obligation to Plaintiffs under this loan requirement and could not breach it.

Plaintiffs have failed to raise a genuine issue of material fact in regard to Loan Requirement No. 7.

Loan Requirement No. 8 states:

> EQUIPMENT PAYMENTS, SHOWN IN CASH FLOW AS $80 PER ACRE, WILL BE LIMITED TO ONLY AMOUNT NEEDED TO PAY NOTE DUE. BORROWER WILL SUPPLY LENDER A SCHEDULE OF ALL NOTES DUE FOR 2013.

Plaintiffs argue that this requirement created an obligation on the part of Citizens to advance $80 per acre for equipment whether the land is farmed. On its face, the loan requirement states that once the Plaintiffs supplied Citizens with a schedule of all notes due for 2013, it would pay them. The amount paid for equipment would be limited to $80 per acre and for only the amount needed to pay the note due.

Affidavits from the farm equipment suppliers establish that all invoices submitted for farm equipment were paid from the inception of the Crop Loan until November 2013, when the funds were exhausted. Plaintiffs have failed to produce evidence that Citizens breached Loan Requirement No. 8 or to show that a genuine issue of material fact exists.

For these reasons, Plaintiffs' assignment of error based on Loan Requirement No. 8 is without merit.

Bad Faith

Plaintiffs argue that Citizens performed its obligations to them in bad faith by secretly increasing the principal indebtedness of the fixed Carry Over Loan and in taking other actions which would benefit another customer of Citizens and Commercial.

La. C.C. art. 1759 states that good faith shall govern the conduct of the obligor and the obligee in all things pertaining to the obligation. An obligor is in bad faith if he intentionally and maliciously fails to perform his

obligation. La. C.C. art. 1997, Revision Comment (b). The term bad faith means more than mere bad judgment or negligence; it implies the conscious doing of a wrong for dishonest or morally questionable motives. *Benton v. Clay*, 48,245 (La. App. 2 Cir. 8/7/13), 123 So. 3d 212, *citing Bond v. Broadway*, 607 So. 2d 865 (La. App. 2 Cir. 1992), *writ denied*, 612 So. 2d 88 (La. 1993).

La. R.S. 6:1124 concerns written credit agreements and states in pertinent part as follows:

> No financial institution or officer or employee thereof shall be deemed or implied to be acting as a fiduciary, or have a fiduciary obligation or responsibility to its customers or to third parties other than shareholders of the institution, unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary. The fiduciary responsibility and liability of a financial institution or any officer or employee thereof shall be limited solely to performance under such a contract and shall not extend beyond the scope thereof.

Citizens had no obligation to Plaintiffs other than performance of the contract in accordance with its terms. It owed no fiduciary duty to them and the scope of that contract cannot be extended to provide one.

Plaintiffs have failed to raise a genuine issue of material fact with regard to bad faith, and this assignment of error is without merit.

Conversion

While there is no definition of conversion in the Louisiana Civil Code, our state establishes the foundation for all torts in La. C.C. art. 2315, which states that "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

In Louisiana, conversion is an intentional tort and consists of an act in derogation of the plaintiff's possessory rights. *Dhaliwal v. Dhaliwal*, 49,973

(La. App. 2 Cir. 11/25/15), 184 So. 3d 773, *writ denied*, 16-0236 (La. 4/4/16), 190 So. 3d 1204, *citing Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So. 2d 756 (La. 1985); *Melerine v. O'Connor*, 13-1073 (La. App. 1 Cir. 2/26/14), 135 So. 3d 1198. To constitute a conversion, an intentional dispossession and/or exercise of dominion or control over the property of another in denial of, or inconsistent with, the owner's rights must be established. *Dhaliwal, supra, citing Melerine, supra,* and *Kinchen v. Louie Dabdoub Sell Cars, Inc.*, 05-218 (La. App. 5 Cir. 10/6/05), 912 So. 2d 715, *writ denied*, 05-2356 (La. 3/17/06), 925 So. 2d 544.

According to the jurisprudence cited above, Plaintiffs had to prove an actual intentional dispossession or exercise of dominion or control over their farming operations. None of the evidence presented by Plaintiffs showed that Citizens did anything other than lend Plaintiffs money and service the loan in accordance with the agreement between the parties. None of Plaintiffs' farming interests were transferred to Citizens. Therefore, this assignment of error is without merit.

For the foregoing reasons, Plaintiffs have failed to supply any evidentiary support raising a genuine issue of material fact with regard to their four causes of action against Citizens, and Citizens's motion for summary judgment was properly granted.

Request for Attorney Fees

Citizens's brief contains a request for attorney fees and costs of appeal under La. C.C.P. art. 2164, noting especially the cost of the defense of certain assignments of error which had previously been the subject of supervisory writs before this court and the Louisiana Supreme Court.

An appellate court may render any judgment that is just, legal and proper on the record on appeal and may award damages for a frivolous appeal. La. C.C.P. art. 2164. This provision is penal in nature and is to be strictly construed. *Victus 1, Inc. v. Stocky's World Famous Pizza #14, Inc.*, 52,221 (La. App. 2 Cir. 9/26/18), 256 So. 3d 1146, *citing Cox v. O'Brien*, 49,278 (La. App. 2 Cir. 8/13/14), 147 So. 3d 809, *writ denied*, 14-1907 (La. 11/21/14), 160 So. 3d 972. Appeals are always favored and, unless the appeal is unquestionably frivolous, damages will not be allowed. *Victus 1, supra*. Damages for frivolous appeal are allowed only when it is obvious that the appeal was taken solely for delay, that the appeal fails to raise a serious legal question or that counsel is not sincere in the view of the law he advocates, even though the court is of the opinion that such view is not meritorious. *Id*. The award of damages and attorney fees for a frivolous appeal are utilized to curtail the filing of appeals that are intended to delay litigation, harass another party or those that have no reasonable basis in fact or law. *Id., citing Nesbitt v. Nesbitt*, 46,514 (La. App. 2 Cir. 9/21/11), 79 So. 3d 347, *writ denied*, 11-2301 (La. 12/2/11), 76 So. 3d 1178.

Generally, when an appellate court considers arguments made in supervisory writ applications or responses to such applications, the court's disposition on the issue considered usually becomes the "law of the case" foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. *Dupre v. Maynard*, 96-1183 (La. App. 1 Cir. 3/27/97), 692 So. 2d 36, *writ denied*, 97-1508 (La. 9/26/97), 701 So. 2d 986, *citing Easton v. Chevron Indus., Inc.*, 602 So.2d 1032 (La. App. 4 Cir.), *writ denied*, 604 So. 2d 1315 (La. 1992), and *writ denied*, 604 So. 2d 1318 (La. 1992). However, the denial of a writ application

creates a different situation. A denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction and does not bar reconsideration of, or a different conclusion on, the same question when an appeal is taken from a final judgment. *Dupre, supra, citing Sattar v. Aetna Life Ins. Co*., 95-1108 (La. App. 4 Cir. 3/20/96), 671 So. 2d 550.

In the case *sub judice*, we do not find that Plaintiffs' attorney sought review on appeal of the interlocutory judgments already considered on writs for the purpose of delay of the litigation, to harass another party or that his arguments had no reasonable basis in fact or law. Further, Plaintiffs were allowed under the law to seek further review of the interlocutory judgments on appeal of the final judgment on the merits.

For the foregoing reasons, this court declines Citizens's request that we assess attorney fees against Plaintiffs for re-raising the interlocutory judgments on appeal.

CONCLUSION

The interlocutory judgments and the final judgments, which granted the motion for summary judgment in favor of Defendant Citizens Progressive Bank and that of Third Party Defendant Commercial Capital Bank and against Plaintiffs KT Farms Partnership II, Thad Kyle Investments, LLC; William C. Aymond; Garrett Aymond; and Hillary Herron; are affirmed. Citizens Progressive Bank's motion for attorney fees pursuant to La. C.C.P. art. 2164 is denied. Costs of this appeal are assessed to Plaintiffs KT Farms Partnership II; Thad Kyle Investments, LLC; William C. Aymond; Hillary Herron; and Garrett Aymond.

AFFIRMED. REQUEST FOR ATTORNEY FEES DENIED.